UNITED STATES COURT OF APPEALS
FOR THE 9TH CIRCUIT

UNITE HERE! LOCAL 8, AFL-CIO, Petitioner, v. THE NATIONAL LABOR RELATIONS BOARD, Respondent.	No. **PETITION FOR REVIEW**

UNITE HERE! Local 8, AFL-CIO ("Local 8") hereby petitions the court for review of the order of the National Labor Relations Board, entered on April 24, 2013, in consolidated cases 19-CA-098908, et seq., attached hereto.

Specifically, Local 8 asserts that it is aggrieved by, and asks this court to review, the portion of the order where the National Labor Relations Board ("NLRB") denied Local 8's request to give retroactive effect to any dues-checkoff authorizations signed since the Employer, Space Needle, LLC, agreed to reinstate payroll dues deduction back to the date the agreement would have gone into effect.

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Respectfully submitted this 5th day of February, 2015.

s/Dmitri Iglitzin
Dmitri Iglitzin, WSBA# 17673
s/Carson Flora
Carson Flora, WSBA# 37608
s/Laura Ewan
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Attorneys for Petitioner
UNITE HERE! Local 8

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of February, 2015, I electronically filed the foregoing Petition for Review with the court, and caused a true and correct copy of the same to be delivered via UPS Overnight mail to:

Richard F. Griffin, Jr., General Counsel
National Labor Relations Board
1099 14th St. NW
Washington, D.C. 20570

Ronald Hooks, Regional Director
National Labor Relations Board, Reg. 19
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Attorneys for Space Needle, LLC

s/Dmitri Iglitzin_____
Dmitri Iglitzin, WSBA # 17673

Attachment

Space Needle, LLC *and* UNITE HERE! Local 8 and Julia Dube. Cases 19–CA–098908, 19–CA–098988, 19–CA–098936, 19–CA–108459, 19–CA–107024

January 30, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND JOHNSON

On March 5, 2014, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The Respondent filed exceptions and a supporting brief, to which the General Counsel filed an answering brief and the Respondent filed a reply brief. The General Counsel filed limited cross-exceptions and a supporting brief, to which the Respondent filed an answering brief and the General Counsel filed a reply brief. The Union filed limited cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] only to the extent consistent with this Decision and Order.[3]

1. We adopt the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by reneging on its agreement with the Union to reinstate payroll dues deduction. We also adopt the judge's findings that the Respondent violated Section 8(a)(1) by distributing letters to employees encouraging and soliciting them to resign from the Union and by polling the employees through tracking their responses to the letters.

On January 2, 2013, the Respondent agreed to reinstate payroll dues deduction but reneged on that agreement on February 11.[4] Before reneging on the agreement, the Respondent distributed to its employees, both by mail and by personal delivery through its managers, letters dated February 5, 2013, advising employees of their options regarding the payment of dues, including the revocation of dues authorizations and resignation from union membership. The letters varied slightly, based on whether an employee had a current dues authorization form on file and whether he or she had been hired before the contract expired. All of the letters informed the employees that the Union had demanded that dues be deducted from their paychecks. The Respondent instructed its managers, when delivering the letters, to inform the employees that the Respondent did not want to resume dues deduction but would do so unless the employee directed it otherwise.

Letters to employees hired before the contract expired who had authorization forms on file stated in part:

> While you might otherwise be able to revoke your authorization to [sic] dues taken from your paycheck, it

[1] The Union has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In adopting the judge's credibility-based finding that Human Resources Manager Beth Reddaway informed employee Earnest Lee Plaster that he would owe 6 months of back dues if he signed a dues-authorization form, we do not rely on the judge's additional statement that it was "logical that Reddaway would have been concerned about six months of back dues because that was the approximate amount of time since Respondent had ceased payroll dues deduction."

No exceptions were filed to the judge's dismissal of allegations that the Respondent violated Sec. 8(a)(1) by informing employees that their union sympathies had been polled when the Respondent told employees that few employees wanted dues deducted from their checks, by tracking whether employees wanted payroll dues deduction reinstated, and by tracking whether employees stated they would pay dues directly to the Union. Nor did any party file exceptions to the judge's dismissal of allegations that the Respondent violated Sec. 8(a)(5) and (1) by failing to bargain regarding the recall of employees, including Julia Dube, and Sec. 8(a)(3) and (1) by failing to recall Dube for "need" shifts. Finally, there are no exceptions to the judge's finding that the allegation involving the Respondent's failure to rehire Dube was moot based on its discriminatory failure to recall Dube from layoff.

[2] In adopting the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) by failing to recall employees Dube and Tracy McCauley from layoff, we find, in addition to the evidence relied on by the judge, that the Respondent's numerous 8(a)(1) violations support the judge's conclusion that the Respondent harbored antiunion animus.

[3] We shall modify the judge's recommended Order to conform to our findings, the amended remedy, and the Board's standard remedial language. We shall amend the date of employment relevant to mailing the notice to reflect the date of the Respondent's earliest unfair labor practice. Consistent with our decision in *Don Chavas LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), we agree with the judge's recommended Order to require the Respondent to provide the tax compensation and Social Security Administration reporting remedies. We shall substitute a new notice to conform to the Order as modified and in accordance with our decision in *Durham School Services*, 360 NLRB No. 85 (2014).

[4] In affirming the judge's finding that the Respondent entered into, and unlawfully reneged on, an agreement to reinstate dues deduction, we note that the Supreme Court's decision in *NLRB v. Noel Canning,* 134 S.Ct. 2550 (2014), rendered the Board's decision in *WKYC-TV, Inc.,* 359 NLRB No. 30 (2012), invalid. However, we agree with the judge that the viability of *WKYC* is immaterial to the issue whether the Respondent entered into the agreement.

> may not be possible at this time because the dues deduction authorization implies that opting out is only permitted during [window periods] . . . .
>
> One option available to you if you do not wish dues to be deducted from your check is to resign union membership. To do this, you must send a letter to the Union . . . stating you want to resign your membership, effective immediately. (A sample letter is available from Human Resources or your Manager.) If you resign union membership it will not impact your wages, benefits or seniority, and you will still participate in your current medical and pension plans.

Letters to employees hired before the contract expired but who did not have authorization forms on file stated in part:

> Since there is not a signed dues deduction authorization form in your file, we cannot begin deducting dues, initiation and reinstatement fees as the Union has demanded. If you wish dues to be deducted from your paycheck, you need to complete a union dues authorization form which you can get from Human Resources or your Manager.
>
> Or, you may pay your union dues and other charges directly to the union at their offices.
>
> One option available to you if you do not want to pay union dues at all is to resign union membership. To do this, you must send a letter to the Union . . . stating you want to resign your membership, effective immediately. (A sample letter is available from Human Resources or your Manager.) Know if you resign union membership it will not impact your wages, benefits or seniority, and you will still participate in your current medical and pension plans.

The sample resignation letter stated:

> I hereby resign as a member of Unite Here Local 8. My resignation is effective immediately.
>
> Please confirm receipt of this letter promptly to my home address at:
>
> Any further collection of dues or fees from me made after your receipt of this letter will violate my rights under the National Labor Relations Act.

Letters to employees hired after the contract expired notified them that they did not have to join the Union or pay dues or fees, but that they should complete a dues authorization form in the human resources department if they so desired. The letters further informed the employees that "[w]hether or not you join the union" would have no impact on wages, benefits, seniority, or eligibility for medical and pension plans.[5] All versions of the Respondent's letters to employees included the statement, "We are not suggesting that you do or do not resign your membership in the union, but we want you to be aware of our understanding of your options."

The Respondent directed its managers to inform Human Resources Manager Reddaway of employee requests for the sample resignation letter. Reddaway maintained a spreadsheet in her office listing all unit employees and noting whether they had requested or submitted a letter withdrawing from union membership.[6]

Under established Board law, an employer may provide only ministerial or passive aid to employees who wish to withdraw from union membership. *Chelsea Homes*, 298 NLRB 813, 834 (1990), enfd. mem. 962 F.2d 2 (2d Cir. 1992). Thus, the employer may lawfully provide neutral information to employees regarding their right to withdraw their union support, provided that the employer offers no assistance, makes no attempt to monitor whether employees do so, and does not create an atmosphere "wherein employees would tend to feel peril in refraining from [withdrawing]." *Mohawk Industries*, 334 NLRB 1170, 1170–1171 (2001), quoting *Vestal Nursing Center*, 328 NLRB 87, 101 (1999); *Erickson's Sentry of Bend*, 273 NLRB 63 (1984) (unlawful solicitation of union resignation where employer assisted in gathering signatures on petition to withdraw union membership); see also *Landmark International Trucks, Inc.*, 257 NLRB 1375 (1981), vacated and remanded 699 F.2d 815 (6th Cir. 1983), affd. 272 NLRB 675 (1984), enf. denied 775 F.2d 148 (6th Cir. 1985); cf. *Mid-Mountain Foods*, 332 NLRB 229, 231 (2000), enfd. 269 F.3d 1075 (D.C. Cir. 2001) (no violation where employer neither assisted employees nor tracked their responses).

Relying on *Perkins Machine Co.*, 141 NLRB 697 (1963), and *Peoples Gas System*, 275 NLRB 505 (1985), the Respondent contends that its February 5, 2013 letters simply informed employees of their rights and therefore did not constitute unlawful solicitation. Those cases are distinguishable in critical respects. In both cases, the collective-bargaining agreements provided for an annual window allowing employees to revoke their dues-

[5] The judge erroneously stated that the letters to "post-expiration hires" were identical to the letters to the "no form on file" employees except for a reference to reinstatement fees. As shown in the language provided above, the letters differed in several regards. For example, the assurances provided to the "post-expiration hires" related to *joining* the union whereas the assurances given to the "no form on file" employees related to *resigning*. Also contrary to the judge, the letters to the "post-expiration hires" did not mention the sample resignation letter.

[6] Although, as stated, the letters to employees hired after the contract expired did not reference the sample resignation letter, those employees were also tracked.

checkoff authorization, and the employers issued letters to union members just prior to the window period, pointing out the contract's checkoff revocation provision and dates. In both cases, the letters reassured employees that the employer was not urging employees either to remain union members or to resign from the union and that their choice would have no effect on their wages, benefits, or treatment. And in each case, the employer's action occurred in an atmosphere free of any coercion.

Here, by contrast, the Respondent did not distribute its letters in anticipation of a contractually-established window period for revocation. In fact, the letters notifying employees of future window periods for revoking dues authorization offered that they could sidestep those periods by resigning from the Union immediately. The suggestion of resignation from the Union as a more expeditious option shows that the Respondent's purpose was not neutral with regard to union membership, as does the timing of the letters—just after the Respondent agreed with the Union to reinstate payroll dues deduction. The Respondent's purpose is further demonstrated by its instructions to its managers to inform employees orally, when delivering the letters, that it did not want to resume dues deduction.[7]

Further distinguishing this case from the cases on which the Respondent relies is the Respondent's attempt to monitor its employees' responses to the letters by requiring the sample resignation letters to be requested directly from management. This put the Respondent in the position of knowing exactly which employees chose to resign their union membership—a fact obvious to employees—and thereby further pressured employees to make that choice. See *Corrections Corp. of America*, 347 NLRB 632, 633, 639 (2006) (employer posted memo regarding how to decertify union and implying that employer would know which employees signed or did not sign such a petition). The Board has found this procedure inconsistent with employees' Section 7 rights and not mitigated by assurances against reprisal for not requesting a form. *Adair Standish Corp.*, 290 NLRB 317, 318 (1988), enfd. in relevant part 912 F.2d 854 (6th Cir. 1990).

Although the letters issued to the postexpiration hires included the reassurance that whether or not they joined the Union would not impact their wages, benefits, or seniority, the letters to other employees only provided that *resignation* would not affect their terms and conditions of employment. None included any assurance about future treatment by the Respondent if employees elected not to resign their union membership. Employees reading the letters' suggestion of immediate resignation from the Union would reasonably be skeptical of the further declaration that "[w]e are not suggesting that you do or do not resign your membership in the union." These letters, together with the Respondent's monitoring of employee requests for sample resignation letters, "create[d] a situation where employees would tend to feel peril in refraining from [withdrawing.]" *Erickson's Sentry of Bend*, supra.

Finally, in sharp contrast to the absence of any other coercive conduct in *Perkins* and *Peoples Gas*, the solicitation here was accompanied by other unfair labor practices, including unlawful polling and coercive statements to employees contemporaneous with the distribution of the letters.[8] Considering all of the above circumstances, we conclude, as did the judge, that the Respondent played more than a purely ministerial and passive role in its employees' decisions regarding union membership and that its letters encouraging employees to resign from the Union constituted unlawful solicitation in violation of Section 8(a)(1). *Chelsea Homes*, supra; *Mohawk Industries*, supra; *Landmark International Trucks*, supra.

With regard to the judge's additional finding of unlawful polling concerning employees' union membership, we have noted that the Respondent told employees that they could obtain a sample letter resigning their membership from their managers or from human resources officials and that when employees did so, managers were to notify Reddaway. Reddaway, in turn, recorded that information, with notations indicating whether she had seen a completed resignation letter. This process allowed the Respondent to closely track who requested, or in some cases completed, the letters and who did not. Whether or not the employees were actually aware that their actions were being documented, they clearly understood that they were revealing their choices regarding membership to management by their action or inaction following the Respondent's letters. The Board has found that as a general matter, placing employees in a position "in which they reasonably would feel pressured to 'make an observable choice that demonstrates their support for or rejection of the union'" is coercive. See *Allegheny*

[7] It is also relevant that the Respondent did not act in response to any employee requests for information or assistance. See *Peoples Gas System*, supra at 509.

[8] Specifically, we rely on Reddaway's statement to Earnest Lee Plaster, soon after he received the Respondent's letter and went to human resources to sign a dues-authorization form, that he would owe 6 months of back dues, which would be deducted from a single paycheck. We also rely on supervisor Harold Fields's statements, discussed further below, about supporting the Union to Andrew Roos as he handed Roos the Respondent's letter. We find that these statements not only related to the Respondent's efforts to encourage employees to resign from the Union, but were also made in furtherance of those efforts.

Ludlum Corp., 333 NLRB 734, 739–740 (2001) (internal citation omitted), enfd. 301 F.3d 167 (3d Cir. 2002); accord: *Hatteras Yachts, AMF Inc.*, 207 NLRB 1043, 1043 fn. 3 (1973) (maintenance of letters revoking dues authorization cards in personnel office where employer could observe which employees withdrew support unlawful). As the judge discussed, the Respondent established no legitimate reason for knowing whether employees resigned their union membership, given the lack of any necessary correlation between membership and dues obligations. In these circumstances, we find that both the solicitation of employees to resign from the Union and the polling of their responses violated Section 8(a)(1).

2. We affirm solely on procedural grounds the judge's finding that the Respondent did not violate Section 8(a)(5) and (1) by unilaterally changing its recall procedures when it added and assigned restaurant servers' shifts after the Spring 2013 bidding process without conducting an additional formal bid. In its exceptions, the Union argues that the judge should have considered the Respondent's failure to apply seniority in assigning the new shifts, rather than its failure to use the bid process. That theory was neither alleged in the complaint nor pursued by the General Counsel at the hearing. Further, the General Counsel did not except to the judge's dismissal of the 8(a)(5) allegation. The General Counsel controls the complaint, and the Union may not enlarge upon or change the General Counsel's theory of the case. *Smoke House Restaurant*, 347 NLRB 192, 195 (2006), enfd. mem. 325 Fed. Appx. 577 (9th Cir. 2009). Therefore, we do not consider the Union's separate theory. Because no party has excepted to the judge's rejection of the only theory alleged by the General Counsel, we adopt her dismissal of this allegation.[9]

3. For the following reasons, we reverse the judge's dismissal of the allegation that the Respondent violated Section 8(a)(1) by interrogating employee Andrew Roos about his support for the Union. On February 9, 2013, Sous Chef Harold Fields, an admitted supervisor, pulled Roos aside and delivered to him the Respondent's letter regarding resignation of membership and revocation of dues checkoff. In that conversation, Fields told Roos that he knew "things were getting a little crazy" and that he wanted Roos to know his options concerning the Union, including resigning his union membership. Fields stated, "I know you're a smart guy and you'll make the right decision. I know you kind of see which way the wind is blowing," and asked Roos if he had any questions.

In dismissing the allegation, the judge reasoned that Fields did not directly question Roos about his union sympathies. In his exceptions, the General Counsel argues that even if the statements did not constitute an interrogation, they were nonetheless coercive.[10] We agree. Fields's statements were made in the context of what the judge found to be a pattern of conduct by which the Respondent solicited employees not to support the Union and closely tracked their continued support. When Fields spoke to Roos, he was acting as directed in furtherance of these efforts. Fields conveyed his displeasure with unions, while assuring Roos that he knew Roos would "make the right decision." In these circumstances, we find that regardless of whether Fields's statements amounted to an interrogation, they were coercive concerning Roos's exercise of his Section 7 rights. See *Wire Products Mfg. Corp.*, 326 NLRB 625, 626–627 (1998) (statements reasonably conveying to employees that they would fare better by abandoning their union support found coercive), enfd. sub nom. *NLRB v. R.T. Blankenship & Associates, Inc.*, 210 F.3d 375 (7th Cir. 2000); *Marshall Durbin Poultry Co.*, 310 NLRB 68, 76 (1993), enfd. in relevant part 39 F.3d 1312 (5th Cir. 1994)

[9] We do not rely on the judge's substantive rationale concerning this allegation. We note that the complaint pertained to the change in the Respondent's recall procedures as a result of its adding and assigning new shifts without conducting a formal bid and without providing the Union notice and an opportunity to bargain, not to the Respondent's decision to add the shifts. Further, we disavow the judge's inference of a clear and unmistakable waiver of the Union's right to bargain over this subject based on past practice. The Board will not lightly infer a waiver of statutory bargaining rights. *Owens-Corning Fiberglas*, 282 NLRB 609, 609 (1987). The record shows no agreement clearly and unmistakably waiving the Union's right to bargain over the process for filling added shifts. *Metropolitan Edison Co. v. NLRB*, 460 US. 693, 708 (1983); *Register-Guard*, 301 NLRB 494, 495 (1991). In addition, a union's acquiescence in an employer's prior unilateral changes does not operate as a waiver of its right to bargain over such changes for all time. *Owens-Corning Fiberglas*, supra at 609.

Nor does the record demonstrate an established past practice. For a past practice to constitute a term and condition of employment whose continuation does not require bargaining, it must occur "with such regularity and frequency that employees could reasonably expect the 'practice' to continue or reoccur on a regular and consistent basis." *Caterpillar, Inc.*, 355 NLRB 521, 522 (2010), quoting *Sunoco, Inc.*, 349 NLRB 240, 244 (2007). The record here reveals no consistent past practice concerning the process utilized for filling shifts added after the regular seasonal bid.

[10] The Respondent argues that the General Counsel's alternative theory that the statements were generally coercive is not properly before the Board because the complaint specifically alleged that the statements constituted an unlawful interrogation. For the reasons set forth in *Greater Omaha Packing Co.*, 360 NLRB No. 62, slip op. at 2 (2014), we reject this argument. As in that case, we find that the coercive statement violation is closely related to the alleged interrogation, as it involves the same facts and the same inquiry as to whether the statement would reasonably tend to coerce Roos, and it was fully litigated. See *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990).

(same); see also *Springs Motel*, 280 NLRB 284, 286 (1986) (even seemingly casual statements can be coercive if made in the context of an employer's efforts to ascertain union sympathies). Accordingly, we reverse the judge's dismissal and find that the Respondent's conduct through Fields violated Section 8(a)(1).[11]

AMENDED CONCLUSIONS OF LAW

1. Insert the following as Conclusions of Law 7 and renumber the subsequent paragraphs.

"7. The Respondent made coercive statements to Andrew Roos concerning his union sympathies in violation of Section 8(a)(1) of the Act."

2. Delete from the judge's Conclusions of Law 8 the words "paragraph 10 (8(a)(1) interrogation)."

AMENDED REMEDY

Having found that the Respondent unlawfully reneged on its agreement to reinstate payroll dues deduction, we amend the judge's remedy to require the Respondent to make the Union whole for any dues it would have received since January 29, 2013, with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), and without recouping the money owed for past dues from employees.[12] In addition, in adopting the judge's Order concerning the tax compensation and Social Security Administration reporting remedies, we rely on *Don Chavas LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

[11] Member Johnson observes that the language the Respondent used to coerce Roos (e.g., that Roos would "make the right decision") is not independently unlawful in light of the Respondent's rights under Sec. 8(c) of the Act, but is coercive here in the context of the Respondent's close monitoring of the Union's support.

[12] For the reasons stated in *West Coast Cintas Corp.*, 291 NLRB 152, 156 fn. 6 (1988), we find that the Respondent must bear sole financial responsibility for the dues amounts it failed to collect. There, the Board adopted the judge's recommended remedy prohibiting the employer from seeking reimbursement from its employees for back dues owed. The judge reasoned that the execution of a checkoff authorization constitutes a tender of dues required under Sec. 8(a)(3) and therefore that the employees had fulfilled their contractual obligations. Further, because the union's loss of dues was caused by the employer's unlawful conduct, the Board concluded that it was proper to allocate the financial obligation of making the union whole for the dues it would have received but for the unlawful conduct entirely to the employer and not the employees.

We deny the Union's request to give retroactive effect to any dues-checkoff authorizations signed since the Respondent agreed to reinstate payroll dues deduction to the date the agreement would have gone into effect. The appropriate remedy is to require the Respondent to make the Union whole for dues it would have received. Accordingly, the amount owed for employees who signed authorizations since the agreement should be calculated based on the actual date of such authorizations.

ORDER

The National Labor Relations Board orders that the Respondent, Space Needle, LLC, Seattle, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with UNITE HERE! Local 8 (the Union) by reneging on its agreement to reinstitute payroll dues deduction.

(b) Polling employees' union support by tracking whether they requested a sample letter of resignation and whether they provided a copy of the resignation letter sent to the Union.

(c) Encouraging or soliciting employees to resign from the Union.

(d) Making coercive statements to employees about their union support.

(e) Coercively informing employees that if they sign a dues-authorization form they will owe back dues.

(f) Failing to recall or otherwise discriminating against employees for engaging in union or other protected concerted activities.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Honor its agreement to reinstitute payroll dues deduction and make the Union whole for any dues the Respondent failed to deduct and remit pursuant to that agreement, in the manner set forth in the amended remedy section of this decision.

(b) Within 14 days from the date of this Order, offer Tracy McCauley and Julia Dube full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make Tracy McCauley and Julia Dube whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(d) Compensate Tracy McCauley and Julia Dube for any adverse income tax consequences of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful failure to recall Tracy McCauley and Julia Dube, and within 3 days thereafter, notify them in writing that this has been done

and that the failure to recall them will not be used against them in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its Seattle, Washington facility copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 5, 2013.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 19 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. January 30, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Harry I. Johnson, III, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain in good faith with UNITE HERE! Local 8 (the Union) by reneging on our agreement to reinstitute payroll dues deduction.

WE WILL NOT poll your union support by tracking whether you request a sample letter of resignation and whether you provide a copy of the resignation letter sent to the Union.

WE WILL NOT encourage or solicit you to resign from the Union.

WE WILL NOT make coercive statements to you about your union support.

WE WILL NOT coercively inform you that if you sign a dues authorization form you will owe back dues.

WE WILL NOT fail to recall or otherwise discriminate against any of you for engaging in union or other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL honor our agreement to reinstitute payroll dues deduction, and WE WILL make the Union whole for all dues that we failed to deduct and remit under that agreement.

WE WILL, within 14 days from the date of the Board's Order, offer Tracy McCauley and Julia Dube full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Tracy McCauley and Julia Dube whole for any loss of earnings and other benefits resulting from our failure to recall them, less any net interim earnings, plus interest.

WE WILL compensate Tracy McCauley and Julia Dube for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful failure to recall Tracy McCauley and Julia Dube, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the failure to recall them will not be used against them in any way.

SPACE NEEDLE, LLC

The Board's decision can be found at www.nlrb.gov/case/19-CA-098908 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

Mara-Louise Anzalone, Esq. and *M. Anastasia Hermosillo, Esq.,* for the General Counsel.

William T. Grimm, Esq. and *Brian P. Lundgren, Esq.,* for the Respondent.

Carson Glickman-Flora, Esq., Lou Christensen, Shop Steward, for the Charging Party.

DECISION

MARY MILLER CRACRAFT, Administrative Law Judge. These consolidated cases[1] involve allegations that Space Needle, LLC (the Respondent) violated its obligation to bargain in good faith with Unite Here! Local 8 (the Union) by refusing to implement an agreement to reinstate payroll dues deductions and by unilaterally changing recall procedures. Further allegations involve discriminatory failure to recall, rehire, and call in employees because of Union activity. Additionally, there are allegations that Respondent assisted employees in resigning from the Union and tracked their responses to this assistance, thus unlawfully polling employee support for the Union. Finally, other allegations involve coercion, informing employees of polling, and interrogation of employees.

On the entire record, including my observation of the demeanor of the witnesses,[2] and after considering the briefs filed by counsel for the General Counsel and counsel for the Respondent, I make the following findings of fact and conclusions of law

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent is a limited liability corporation operating the iconic Space Needle located at 203 Sixth Avenue, Seattle, Washington. A restaurant, the revolving SkyCity, as well as banquet rooms at the Skyline level, and an observation deck comprise the three floors upper portion of the structure. During the 12 months preceding issuance of the complaint, Respondent derived gross revenues in excess of $500,000 and purchased and received goods valued in excess of $50,000 directly from points outside the State of Washington. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act. Thus, I find that this

[1] The Union filed the underlying unfair labor practice charges in Cases 19–CA–098908, 19–CA–098988, 19–CA–098936, and 19–CA–108459 between February 21, and July 2, 2013. Julia Dube, an individual, filed the unfair labor practice charge in Case 19–CA–107024 on June 10, 2013. The third consolidated complaint (the complaint) issued on August 23, 2013, and was further amended at hearing and post-hearing. Hearing was held in Seattle, Washington from September 16 to 20, and October 22 to 24, 2013. Allegations based on unfair labor practice charges in Cases 19–CA–092857 and 19–CA–093995, originally consolidated with these cases, were withdrawn.

[2] Credibility resolutions have been made based upon a review of the entire record and all exhibits in this proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credibility. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

dispute affects commerce and that the Board has jurisdiction of this case pursuant to Section 10(a) of the Act.

II. COLLECTIVE-BARGAINING RELATIONSHIP

Since at least 1987, pursuant to Section 9(a) of the Act, Respondent has recognized the Union as the exclusive collective-bargaining representative of employees in the following unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All food and beverage preparation and service employees at the facility, including cooks, bartenders, kitchen employees, bussers, servers, greeters, reservationists and valet; excluding office clerical employees, sous chefs, guards, and supervisors as defined in the Act, and all other employees.

The parties' most recent collective-bargaining agreement was effective by its terms from June 1, 2008, through May 31, 2011, and postexpiration it was extended day-to-day by agreement through May 20, 2012.

At the time of the hearing in this case, the parties had not reached agreement on a successor contract. Approximately 13 bargaining sessions and 6–7 mediation sessions have been held.

III. PAYROLL DUES DEDUCTION

The General Counsel alleges that Respondent agreed to reinstate postexpiration dues deduction and then reneged on its agreement to do so in violation of Section 8(a)(5) and (1). I find the violation as alleged.

Facts

Until expiration of the day-to-day extension of the contract on May 20, 2012, the Employer honored employee dues deduction authorizations. Beginning on June 1, 2012, however, the Employer ceased deducting union dues under then-existing precedent allowing for such cessation. See *Bethlehem Steel*[3] (employer's obligation to check-off dues terminates on expiration of collective-bargaining agreement). On December 12, the NLRB issued *WKYC-TV, Inc.*, 359 NLRB No. 30 (2012), holding that it would no longer follow the *Bethlehem Steel* rule. However, the Board explained that the WKYC-TV rule, that the dues-checkoff obligation remains in effect after contract expiration was to be applied prospectively only. *WKYC-TV*, supra, 359 NLRB No. 30, slip opinion at 8–9.

Nevertheless, by letter of December 19, 2012, Erik Van Rossum, secretary treasurer of the Union, advised Respondent's Human Resources Manager Beth Reddaway[4] that pursuant to *WKYC-TV,* Respondent was required to bargain with the Union before it could cease honoring dues-checkoff authorizations. Actually, the Union's advice was contrary to the holding of *WKYC-TV* that the change of law would be applied prospectively only. In any event, in response, by letter of January 2, 2013[5] to Van Rossum with a copy to Respondent's Attorney William T. Grimm, and Robin Ylvisaker, vice president, finance, stated,

> We are comfortable in our decision related to dues deduction post the termination of the day to day extension of our agreement on May 29, 2012, but feel the recent NLRB ruling supports your position that we should begin withholding of dues as soon as you can provide us the information necessary to do so.
>
> Please provide us with a current list of Team Members and all amounts owed and we can re-establish automated dues collection and the subsequent distribution to you. Our next potential effective date for dues collection is January 8th and in order for us to withhold dues at that time, we need this information by Monday, January 7th.
>
> As is customary, you should expect the dues we collect for you to be delivered to your office within 7 days after the pay period ends.

On Friday, January 4, Lynn Brown, member coordinator for the Union, emailed the dues invoice to Ylvisaker. Ylvisaker responded with a thank you late on Monday, January 7, explaining that she had been out of the office on Friday and most of the day Monday. On January 8, Ylvisaker emailed Sevart, Reddaway, and Douglas stating that all of the questions regarding dues deduction had now been addressed by the Union. She continued, "The only minor questions I can think we could volley would be: *ask for an initiation rate schedule *a real "play dumb" question of what "Rein. Fees" mean." In conclusion, Ylvisaker suggested that the Union be told that given the amount of data and the Union's tardiness in submitting the data 1 day later than requested,[6] Respondent could not begin dues deductions until the January 20 pay period.

On January 11, Ylvisaker advised Van Rossum by email that due to the amount of data entry involved, Respondent was unable to begin dues deduction for the pay cycle ending January 8. The correspondence concluded,

> Our next pay day is January 29th. I see no reason why this sizeable amount of data cannot be entered into the payroll system by then. You should also expect that we'll turn around our payment to you quicker than normal—hopefully within a few days after the pay period ends.

On January 21 and again on January 31, the Union advised Ylvisaker and Grimm that once checkoff was reinstated, the Union would request withdrawal of pending unfair labor practice charges regarding dues deduction. However, on February 11, Respondent's Attorney Grimm advised the Union that Respondent "has decided that it will not reinstitute the dues deduction program" because *WKYC-TV* is prospective only and therefore does not require reinstitution of dues deduction. The email correspondence averred that *C & G Distributing Co.,* 359

[3] *Bethlehem Steel Co. (Shipbuilding Div.),* 136 NLRB 1500, 1502 (1962), remanded on other grounds sub nom. *Marine & Shipbuilding Workers v. NLRB,* 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964).

[4] At the time of this communication, Reddaway reported directly to CEO Ron Sevart. In February, Nancy Hawman was hired as director of human resources and since that time, Reddaway reports directly to Hawman.

[5] Unless otherwise referenced, all further dates are in 2013.

[6] The email assertion regarding timeliness appears to be contrary to the record evidence that the data was requested by Monday, January 7, and was supplied Friday, January 4. In any event, Respondent did not rely on this assertion when it responded to the Union.

NLRB No. 53 (2013), a January 24 decision, made clear that employers who ceased honoring dues checkoff prior to the December 12, 2012 issuance of *WKYC-TV* could lawfully continue to cease honoring checkoff provisions of the expired agreement.

Analysis

By its letter of January 2, Respondent agreed to reinstitute dues deduction. Thus, in response to the Union's request that Respondent reinstitute dues deduction, Respondent's first sentence states:

> We are comfortable in our decision related to dues deduction post the termination of the day to day extension of our agreement . . . but feel the recent NLRB ruling supports your position that we should begin withholding of dues as soon as you can provide us the information necessary to do so.

As Respondent notes, this is an equivocal sentence. On the one hand, the sentence conveys that Respondent believes it lawfully ceased dues deduction and on the other hand, Respondent states that the recent decision in *WKYC-TV* supports the Union's position that Respondent should begin withholding dues. Were this sentence the full extent of the parties' communication on the issue, it would be difficult to find a meeting of the minds. However, what followed this sentence is unequivocal and indicates contextually that a meeting of the minds occurred and the parties reached an agreement to reinstitute dues deduction.

Thus, Respondent follows the first sentence by requesting the data necessary to re-establish automated dues collection and subsequent distribution to the Union. The letter concludes, "As is customary, you should expect the dues we collect for you to be delivered to your office within 7 days after the pay period ends." In so stating, Respondent agreed to the Union's request to reinstate dues deductions. A meeting of the minds is obvious. Moreover, I specifically reject Respondent's argument that if an agreement was reached it is invalid because the agreement was based upon a mistake of law, i.e., that *WKYC-TV* was to be retroactively applied, rather than prospectively applied as it clearly states. In general, an agreement based on a mistake of law may not be unilaterally rescinded. See, e.g., *Mueller-Gordon Motor Co.*, 179 NLRB 9, 10 (1969).[7]

Further evidence of a meeting of the minds follows the January 2 letter. In Respondent's communications and actions following up on the January 2 letter,[8] it manifested an intention to reinstitute dues deduction.[9] Thus, once the Union submitted the requested information regarding amounts owed, Respondent thanked the Union and stated that there was too much information to input in time for the pay cycle ending January 8 but it would be able to do so for the next pay cycle.[10] This conduct evidences an administrative delay regarding data input but continues to acknowledge an agreement to reinstate dues deduction.

Section 8(d) of the Act provides that the duty "to bargain collectively is the performance of the mutual obligation of the employer and the union to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." Failure to bargain in good faith is an unfair labor practice pursuant to Section 8(a)(5). Moreover, once agreement is reached on a subject, the parties are obligated to honor their agreement by implementing the agreed-upon terms.

Based on the communications and actions of the parties, I find the parties entered into an agreement to reinstitute dues deduction on January 2. On February 11, Respondent reneged on this agreement. By doing so, Respondent violated Section 8(a)(1) and (5) of the Act.

IV. COMMUNICATIONS REGARDING DUES DEDUCTIONS

The General Counsel alleges that various communications regarding dues deduction violated Section 8(a)(1) of the Act. Specifically, tracking employee responses to letters of February 5 is alleged as unlawful polling and unlawful encouragement or solicitation of employees to resign from the Union. A statement by Reddaway is alleged as unlawful coercion, Sous Chef Harold Field allegedly interrogated an employee, and CEO Sevart allegedly informed employees that their Union sympathies had been polled.

A. Alleged Unlawful Polling and Unlawful Solicitation to Resign

Facts

After receiving the Union's December 19, 2012 letter regarding reinstitution of dues deduction but before Respondent's letter of February 11 advising the Union that the dues deduction program would not be reinstituted, Respondent's president and CEO communicated with each employee using one of three form letters dated February 5. The language of the letters varied depending on whether the employee had a current dues deduction form on file (form on file), did not have a current dues deduction form on file (no form on file), or was not hired until after expiration of the extension of the contract on May 20[11] (postexpiration hires).

[7] Respondent attacks *WKYC-TV* as invalid and without precedential value arguing that pursuant to the decision in *Noel Canning v. NLRB,* 705 F.3d 490 (D.C. Cir. 2013), certiorari granted 133 S.Ct. 2861 (2013), the Board did not have a proper quorum to issue *WKYC-TV.* Thus, Respondent argues that to the extent the complaint herein is based on *WKYC-TV,* the complaint was improperly issued. In my view, the complaint herein is not based on *WKYC-TV* at all. Moreover, even were it based on *WKYC-TV,* unless and until it is affected by the ruling in *Noel Canning* on certiorari, *WKYC-TV* remains binding. Thus, I reject Respondent's argument that the complaint was improperly issued.

[8] Respondent's subsequent actions are judged by a reasonable standard with no consideration for unexpressed intentions. *Pittsburgh-Des Moines Steel Co.,* 202 NLRB 880, 888 (1973).

[9] See, e.g., *Capitol-Husting Co. v. NLRB,* 671 F.2d 237, 243 (7th Cir. 1982) (in order to find acceptance of an offer, conduct manifesting an intention to be bound is sufficient).

[10] The internal communication dated January 8 from Ylvisaker to Sevart, Reddaway, and Douglas may indicate that Respondent was looking for excuses to delay implementation of dues deduction. However, this internal communication plays no part in determining whether an agreement was reached.

[11] The letters that are set out below state that the contract expired on June 1, 2012. However, the record indicates that the contract was in

The letter to "form on file" employees stated:

> An Important development that requires your immediate attention. . . .
>
> What Happened. . . .
>
> On June 1, 2012 the contract between [Respondent] and [the Union] expired. Under the law, [Respondent] was no longer obligated to deduct union dues, fees, fines, assessments and other union costs from our Team Members' [sic] paychecks, and so we stopped those deductions.
>
> What Changed. . . .
>
> The National Labor Relations Board recently changed that law, one that had been in effect more than 50 years, and held an employer's obligation to deduct union dues continues after expiration of a union contract that requires those deductions. [The Union] has demanded that we again begin deducting dues, initiation and reinstatement fees from our Team Members' paychecks. We are considering whether to begin deductions in the near future. To determine the amount the union wants withheld from your paycheck, please see Human Resources or your Manager.
>
> What Are Your Options. . . .
>
> Since there is a signed dues deduction authorization form in your file, we may begin deducting dues, initiation and reinstatements fees, effective February 26, 2013, unless you tell us not to begin deducting those fees by February 12, 2013, as discussed below.
>
> While you might otherwise be able to revoke your authorization to dues [sic] taken from your paycheck, it may not be possible at this time because the dues deduction authorization implies that opting out is only permitted during the period June 1 through June 10 each year or within ten (10) days of the anniversary date on which you originally authorized deduction of dues. The date you originally auathorized [sic] dues deduction was [individual date inserted here].
>
> One option available to you if you do not wish dues to be deducted from your check is to resign union membership. To do this, you must send a letter to the Union [supplying name and address], stating you want to resign your membership, effective immediately. (A sample letter is available from Human Resources or your Manager.) If you resign union membership it will not impact your wages, benefits or seniority, and you will still participate in your current medical and pension plans. We are not suggesting that you do or do not resign your membership in the union, but we want you to be aware of our understanding of your options.
>
> If you have questions, we are here to help. See Beth Reddaway in the Human Resources Department or your Manager.

The letter to "no form on file" employees and "post-expiration hires" differed substantively from the letter to "form on file" employees only as to paragraphs one and two under the caption "What Are Your Options." The third and fourth paragraphs under the "What Are Your Options" caption as well as the rest of the letter were identical to the letter sent to "form on file" employees. Instead of the first two paragraphs under the "What Are Your Options" caption, the following two paragraphs were the first two paragraphs of the "no form on file" letter:

> Since there is not a signed dues deduction authorization form in your file, we cannot begin deducting dues, initiation and reinstatement fees as the Union has demanded. If you wish dues to be deducted from your paycheck, you need to complete a union dues authorization form which you can get from Human Resources or your Manager.
>
> Or, you may pay your union dues and other charges directly to the union at their offices.

The letter to "post-expiration hires" was identical to the "no form on file" letter except it omitted the reference to reinstatements fees.

The sample letter for withdrawal from Union membership, referred to in all versions of the February 5 letters, stated, "I hereby resign as a member of [the Union]. My resignation is effective immediately." The sample then asked for confirmation of receipt of the letter at the employee's home address and ended, "Any further collection of dues or fees from me made after your receipt of this letter will violate my rights under the National Labor Relations Act."

In addition to mailing the February 5 letters to each employee, managers also hand delivered the letters to employees, one at a time. Managers were instructed to tell each employee that Respondent did not want to reinstate dues deduction but would do so unless employees instructed Respondent by February 6 not to deduct dues from their pay.

After sending the February 5 letters to all unit employees, Respondent kept a spread sheet showing what form, if any, had been requested by each employee. The notations state for instance, "membership (not seen form)," "none, pay on own," "none, not completing either form," "dues authorization," "membership (have form)," "membership (still deciding, not seen form)," and "wants to cancel dues authorization, wants to pay on own." As of April 2013, there were notations for about 38 percent of the employees.

Analysis

The General Counsel alleges Respondent engaged in unlawful polling by tracking employee responses to the letter and documenting

- whether a resignation letter was requested,
- whether Respondent had been provided a copy of the resignation letter,
- whether the employee requested that payroll dues deduction be reinstated, and

effect through May 30, 2011, and was extended by agreement through May 20, 2012. Although I note this unexplained discrepancy in the final date of day-to-day extension—June 1, 2012 versus May 20, 2012—I find that it is not material to the issues before me. The February 5, 2013 form letters clearly state that the day-to-day extension of the contract has expired and the fact of expiration—not the specific date—is relevant in the context of the letters.

- whether the employee stated that dues would be paid directly to the Union.

The General Counsel further alleges that the February 5 letters unlawfully encouraged or solicited employees to resign from the Union.

In the circumstances of this case, keeping track of employees' union sympathies must be carefully distinguished from gathering the necessary information to reinstitute dues deduction. As Respondent notes, an employer must ensure valid, accurate dues deduction authorizations before deducting dues from employees' pay. After full consideration of the record as a whole, however, I find that Respondent went further than ensuring the accuracy of dues deduction forms. I find that by tracking whether employees requested a resignation letter and whether employees completed a resignation letter, Respondent unlawfully polled employees' Union sympathies. Further, I find that Respondent unlawfully solicited employee resignation from the Union.

Although polling may take many forms[12] and occur in a variety of contexts,[13] the essential harm in unlawful polling is that employees are forced to reveal their union sentiments to their employer without appropriate safeguards.[14] Pursuant to the February 5 letters, all employees were advised that they could send a letter to the Union resigning their membership. The February 5 letter set out the Union's address and what the resignation letter should state and parenthetically told employees that a sample letter was available in human resources or from their manager. Thereafter, Respondent kept track of which employees asked for the resignation letter and which employees completed the resignation letter.

Respondent argues that all the information it tracked was necessary for reinstituting the dues deduction program. However, Respondent does not explain how membership in the Union plays a part in dues deduction. Indeed, it is difficult to understand how union membership would be relevant to dues deduction issues. After all, employees are free to remain nonmembers even in the face of a lawful union-security clause.[15]

Relying on *Globe Construction Co.*, 162 NLRB 1547, 1549 (1967), the General Counsel argues that keeping track of employee union membership by noting which employees requested a resignation letter and afterwards provided a copy of the resignation letter constitutes polling. Based on the record as a whole, I agree with the General Counsel and find that Respondent engaged in unlawful polling by tracking employee requests for resignation forms and by noting whether employees provided a copy of the completed resignation form. By making the resignation form available through human resources and tracking which employees requested the form and which employees provided a completed resignation form to human resources or their manager, employees were forced to reveal their Union sentiments to their employer without any safeguards. Thus, I find Respondent violated Section 8(a)(1) by tracking whether each employee requested a resignation letter and whether the employee provided Respondent with a copy of the completed resignation letter.

The General Counsel alleges two other spreadsheet items constitute unlawful polling: tracking whether employees requested that payroll dues deduction be reinstated and tracking whether employees stated that they would pay their dues directly to the Union. However, the General Counsel cites no authority for the proposition that tracking dues deduction authorizations or tracking whether employees pay their dues directly to the Union is violative of the Act. Respondent argues that tracking these items was necessary for reinstituting dues deduction. I agree with Respondent that whether an employee wanted payroll dues deduction reinstated was a necessary fact to gather in order to reinstitute dues deduction. I disagree that it was necessary for Respondent to track whether an employee stated that dues would be paid directly to the Union in order for Respondent to reinstitute dues deduction. However, tracking this latter item does not require an employee to divulge Union sentiments. Rather, tracking this item provides the inverse information. It reveals how some employees who do not want to utilize payroll dues deduction will satisfy their obligation to the Union. Thus, I find that by tracking whether an employee requested that payroll dues deduction be reinstated and whether an employee stated that dues would be paid directly to the Union did not force employees to reveal their Union sentiments and did not violate Section 8(a)(1) of the Act.

The General Counsel also alleges that the Respondent provided unlawful encouragement or solicitation of employees to resign from the Union. The February 5 letter stated, inter alia, that dues may be deducted from employee paychecks unless the employee revoked an existing dues authorization or resigned from the Union. The letter also contained instructions for resigning from the Union and informed employees they could obtain a sample withdrawal letter from human resources.

In *North Hills Office Services*, 346 NLRB 1099, 1103 (2006), the Board addressed solicitation of employee resignation from the union as follows:

> "An employer may lawfully inform employees of their right to revoke their authorization cards, even where employees have not solicited such information, as long as the employer makes no attempt to ascertain whether employees will avail themselves of this right nor offers any assistance, or otherwise creates a situation where employees would tend to feel peril in refraining from such revocation." *R. L. White Co.*, 262 NLRB

[12] For example, a "union truth quiz" was held unlawful polling in *Sea Breeze Health Care Center,* 331 NLRB 1131, 1132–1133 (2000); antiunion paraphernalia distributed in a manner that pressured employees to make an observable choice was held to constitute polling in *A. O. Smith Automotive Products Co.,* 315 NLRB 994 (1994); and in *Allegheny Ludlum Corp.,* 333 NLRB 734 (2000), enfd. 301 F.3d 167 (3d Cir. 2002), the employer unlawfully polled employees by asking them to sign a written request for exclusion from an antiunion video the employer was making.

[13] Polling sometimes occurs after a union requests recognition and sometimes when employees are already represented by a union and the employer polls as to whether employees continue to desire representation.

[14] See *Struksnes Construction Co.,* 165 NLRB 1062, 1063 (1967) (polling violative unless certain safeguards observed).

[15] *NLRB v. General Motors Corp.,* 373 U.S. 734, 742 (1963) (8(a)(3) proviso requiring as a condition of employment "membership" in a labor organization "whittled down to its financial core").

575, 576 (1982) (footnote omitted). Nevertheless, an employer may not "exceed the permissible bounds of providing ministerial or passive aid in withdrawing from union membership." *Chelsea Homes*, 298 NLRB 813, 834 (1990), enfd. mem. 962 F.2d 2 (2d Cir. 1992) (finding violation when employer provided sample form and preaddressed envelope). The Board may also find such statements unlawful when made in the context of contemporaneous unfair labor practices. *Air Flow Equipment, Inc.*, 340 NLRB 415, 418 (2003); see generally *Register Guard*, 344 NLRB 1142, 1143–1144 (2005).

Based on this authority, I find that because Respondent made resignation information available in the context of unlawfully tracking employee action to obtain and complete the resignation forms and in the context of unlawfully reneging on its agreement to reinstitute dues deductions, it violated Section 8(a)(1) of the Act in soliciting withdrawals from the Union due to contemporaneous unfair labor practices.

B. Allegedly Informing Employees that their Union Sympathies had been Polled

Facts

On Tuesday, February 12, all employees attended one of two meetings held on the Skyline level of the facility. CEO Ron Sevart addressed employees at both meetings using a prepared script. During this speech, Sevart stated that it was apparent that few employees wanted dues deducted from their checks noting that only one employee requested a form asking for dues to be deducted from his pay. Sevart told employees that based on the information the Union sent to Respondent, there were 126 of 189 team members not paying dues and 24 employees who had never joined the Union. Sevart concluded, "That means a minimum of 150 of our 189 team members, or 80% of our team members represented by [the Union], are not paying dues." Because of this, Sevart told the employees that Respondent would not comply with the Union's request to reinstitute dues deduction.

Analysis

The General Counsel alleges that these statements violated Section 8(a)(1) by informing employees that their Union sympathies had been polled. However, close examination of Sevart's statement does not convince me that he informed employees that their Union sympathies had been polled. Rather Sevart's statement discusses the number and percentage of employees paying Union dues. Moreover, Sevart clearly indicated that his information regarding payment of dues was given to him by the Union itself. Thus, I do not find that Sevart's statement indicated that Respondent was closely monitoring Union membership. Rather, his statement is reasonably understood only to indicate that the Union sent him this information. As to tracking dues deduction authorizations, as previously stated, there is no violation to do so or to reference this tracking to employees.

C. Alleged Coercion

Facts

The complaint alleges that Human Resources Manager Beth Reddaway coerced an employee by telling him that if he signed a dues authorization form, he would owe 6 months of back dues. Shortly after receiving his February 5 "no form on file" letter, Banquet Captain Lee Plaster spoke with Beth Reddaway in human resources about filling out a dues authorization form. According to Plaster, Reddaway told Plaster that since the end of the day-to-day contract there were only 30 employees paying their dues. She added that if Plaster signed the dues authorization form, he would owe 6 months back dues and this would be deducted from his first paycheck. Reddaway initially testified that she recalled that Plaster requested a dues deduction form but she did not recall telling him he would owe 6 months of back dues from his first check. On further questioning, she testified that she never told him that he would owe 6 months of back dues from his first check:

> Q. Did you ever state to Mr. Plaster that if he got—if he had dues taken out, that he would have to pay six months of dues?
>
> A. I don't recall that.
>
> Q. Did you have information showing how much back dues a given employee owed at that time?
>
> A. No.
>
> Q. What information did you have at that time about back dues?
>
> A. I didn't have any information about back dues.
>
> Q. Did you ever state to Mr. Plaster that the six months of back dues would come out of his first check?
>
> A. Never.
>
> Q. When you say never, you mean didn't happen or you don't recall?
>
> A. I never knew nor do I know if he has back dues or not. So I would never be able to reference him owing back dues.

Analysis

I find that Reddaway made the statement that if Plaster signed the dues authorization form, he would owe 6 months of back dues. Both Reddaway and Plaster were credible witnesses. Indeed, Reddaway testified on two occasions and was present throughout the entire hearing. Her composure was remarkable and her competence undeniable. However, Reddaway's initial testimony was that she did not recall whether she told Plaster that he would owe 6 months of back dues. I credit this statement and furthermore note that it is logical that Reddaway would have been concerned about 6 months of back dues because that was the approximate amount of time since Respondent had ceased payroll dues deduction.

Further questioning of Reddaway, of course, led her to testify inconsistently that since she had no information about back dues, she never told Plaster that 6 month's dues would come out of his first check. I am unconvinced that this fact—that she had no information about back dues—provides a logical excuse for denial of her statement that she did not recall. It is far more reasonable to conclude that her initial answer, that she did not

recall, was the truth and that she reconsidered her testimony when she was further questioned about it on direct. A statement of dire financial consequences to an employee because he opted to take advantage of payroll dues deduction would prove daunting in any circumstances. Thus, in agreement with the General Counsel, I find this statement coercive.

D. Alleged Interrogation

Facts

On Saturday, February 9, at 7:45 a.m., line cook Andy Roos was given a copy of his "form on file" letter by his boss, Sous Chef Harold Fields during a one-on-one conversation in the restaurant. Fields said he knew things were getting a little crazy "around here" and he wanted to let Roos know his options concerning the Union. Fields told Roos one of his options was to resign from the Union without any effect on his wages, benefits, or seniority. Fields said he knew what it could be like when a union comes in and tries to take over. Fields stated, "I know you're a smart guy and you'll make the right decision. I know you kind of see which way the wind is blowing." Fields asked if Roos had any questions and Roos responded that he did not. Fields did not testify. I fully credit Roos' unrebutted testimony. The General Counsel alleges that this conversation constitutes unlawful interrogation.

Analysis

No questions were asked during this conversation as related by Roos. Acknowledging this, the General Counsel nevertheless argues that many of the statements invited comment or answers and thus were in the nature of questioning. The General Counsel particularly notes that Fields' asking if Roos had any questions was an obvious invitation for Roos to state whether he was a Union advocate. I disagree and find no violation. In my view, not only were there no questions but asking Roos if he had any questions did not invite him to state whether he supported the Union or not. Thus, this complaint allegation is dismissed.

V. ALLEGED UNILATERAL CHANGE IN RECALL PROCEDURES

The General Counsel alleges that Respondent unlawfully changed its recall procedures in violation of Section 8(a)(5) and (1) of the Act when on March 25, 2013, it added and assigned approximately 25 new shifts to restaurant server schedules without issuing a March/April bid for shifts. The General Counsel further alleges that by failing to recall employees from layoff to cover the new shifts and by waiting until the right(?) of recall expired for those employees laid off in December and January in order to avoid rehiring those employees, Respondent violated Section 8(a)(5) and (1).

Facts

There is no dispute regarding the basic procedures for recall. The Employer's restaurant has seasonal ebbs and flows in amounts of business. These ebbs and flows of business result in the layoffs, recalls, and rehiring of servers. The summer season is busiest, winter is the least busy. In fact, during the winter season, the restaurant is typically closed for renovation and maintenance each year during a part of January. The fall and spring seasons have intermediate amounts of business.

In order to accommodate these fluctuations in business, Respondent conducted four bids in 2011, one for each season: winter, spring, summer, and fall. Five bids were conducted in 2012. The extra bid in 2012 was a second spring bid. In 2013, Respondent reverted to four bids. Whether there are four or five bids in a year, the first bid of the year, the winter bid, is usually conducted in January. The spring bid is usually conducted in February. The 2012 second spring bid was conducted in April.

For each bid, a bid sheet is prepared by Director of Restaurant Operations Crystal Dare after she receives a business forecast from Vice President of Revenue Michael Douglas. Based on the forecast, Dare decides the number of shifts necessary to cover the projected business levels. Dare then posts a bid sheet which lists each lunch and dinner server shift with the names of the server left blank. In order of seniority, current servers write their names on the bid sheet for the shifts that they want. For instance, the most senior server might choose Monday, Tuesday, Wednesday, and Thursday evenings. Each server may choose up to five shifts but must choose at least three shifts to maintain seniority. Once the bid is finalized, a server may not drop a shift until the next bid.

After all current servers have selected their shifts, if more than three shifts are still available, Dare recalls past servers from layoff in order of seniority. All servers on layoff retain their seniority for 120 days. The restaurant is typically closed for a part of January for annual maintenance. The days of closure for maintenance do not count for layoff purposes. In other words, if the restaurant is closed for renovation and maintenance for 7 days, each server retains seniority for 127 days.

Thus, servers laid off during the winter season retain their seniority for 120 days plus the days the restaurant is closed in January. These laid-off servers are the ones eligible for recall for the spring season. If there is an insufficient number of laid-off servers to fill the shifts, Dare hires through open interviews.

Of course, these easy to follow, black and white rules, only provide the broad contours of the system and our case, as it evolves, will turn on the details. As might be expected, employees are sometimes unable to report to work as scheduled, go on vacation, medical leave sometimes becomes necessary, and unexpected upticks in business sometimes occur. To ensure flexibility in the system and in order to adequately cover the business, the collective-bargaining agreement and several longstanding practices come into play. These detail items include on-call shifts, needs shifts, emergency shifts, adding a line, and adding a shift.

On-call shifts are labeled "AM o/c" and "PM o/c" on the schedules. The collective-bargaining agreement provides that on-call shifts will be offered first on a voluntary basis and then assigned in order of inverse seniority. If the on-call server is not called in, the server receives 2 hours pay. At the time of each bid, specific servers are designated for on-call duty on particular days of the week for either the AM or the PM shift. Generally there have been anywhere between 11 and 20 on-call employee shifts on a weekly basis throughout the past 3 years.

Need shifts occur when a manager determines that an additional server is needed for a single shift and more than 24 hours exists before that shift. The manager notes the need in the trade

book and qualified servers may sign up for the shift but may be bumped by a more senior employee. Similarly, if an employee wants to give away or trade a single shift, the employee may note the trade in the trade book. Another server may sign up for that shift but may be bumped by a more senior server.

Emergency need shifts are those which must be filled in less than 24 hours. According to an internal memorandum, Respondent's practice is to fill the shift with any trained current employee without regard to seniority. If no current servers are available, Respondent usually calls employees trained for the position but working in other departments at the time of the emergency. However, such employees, due to their job in another capacity, have no server seniority. Laid-off servers who are still carrying their server seniority are not called for emergency shifts. In 2010, in connection with a grievance, the Union urged Respondent to modify this practice but the parties did not reach agreement.

Another variance on the shift bid scenario is the practice of adding a line. A line is added when the forecast indicates that more shifts are needed and existing servers are unwilling or unable to handle the extra work. Adding a line adds one person to the schedule but does not change existing shifts. Thus, when business increases between bids, a line is added if none of the existing servers can take the extra work. Adding a line differs from adding a shift for a special event or a holiday. Adding a shift is a singular occurrence which does not add a line or a new server to the existing schedule.

Although Respondent had only four bids in 2011, a second spring bid was held in April 2012, resulting in a total of five bids for 2012. According to Michael Douglas, vice president of revenue, this second spring bid was necessary in 2012, because the King Tut exhibition opened in the Seattle Science Center, located about 300 feet from the Space Needle; the Chihuly garden glass exhibit, located nearby, opened; and it was the 50th anniversary of the Space Needle. According to Douglas, this was a "once in a life time" convergence of events which would no doubt increase business at the Space Needle. These circumstances resulted in a second spring bid in 2012. Comparison of the schedules before and after the April 2012 bid indicates that 40 shifts were added. Twenty-four of these additional shifts were absorbed by recall of five laid off servers. The remainder of 16 shifts was taken by existing servers.[16]

Ultimately, no second spring bid was conducted in 2013. However, on the March 25 schedule, Dare added approximately 25–30 new shifts.[17] Ten of these shifts were absorbed by two recalled servers. The remainder of the shifts was spread among 14 current servers. All seven AM on-call shifts were eliminated in order for the servers to handle the increased number of shifts. In other words, the servers who were previously assigned the AM on-call shifts were assigned five full shifts each on the March 25 schedule and could not carry a sixth on-call shift due to the five-shift maximum. There is no evidence regarding whether servers were offered the 25–30 shifts or were simply assigned the shifts. The Union was not notified that 25–30 shifts were being added to the March 25 schedule and no bargaining occurred regarding the addition of these shifts. Similarly, in May 2011, the Union was not notified when 26 shifts were added without a bid.

Employees believed that Dare had announced that a second spring bid would be held in 2013, and that she later reneged telling them there would be no second spring bid. Dare did not recall whether she told employees there would be a second spring bid in 2013, but testified that it would not be unreasonable for employees to believe there would be one. In any event, to address employee concerns about a second spring bid, Shop Steward Christensen met with Douglas on April 1. Laid-off server Julia Dube, the second most senior server on layoff at that time, accompanied Christensen. Christensen told Douglas that Dare was adding shifts and servers felt overworked just as the cruise ship season was about to begin. Christensen reported that Dare initially told servers there would be a second spring bid in 2013, and had recently announced there would not be one. Christensen asked for a second spring bid so laid-off employees could be brought back to absorb some of the work. Douglas said he would discuss the matter with Dare and get back to Christensen on the issue. Christensen also asked if there was any specific reason that Dare might not want Dube recalled. Neither Dube nor Douglas was aware of any issues. Dube gave Douglas a copy of her customer satisfaction statements.

In a memorandum of April 3, Douglas responded regarding staffing stating basically that there was no need for a second spring bid. Douglas compared the first 3 months of 2012 and 2013 noting that the number of server hours, average number of guests per shift, and number of guests served per server hours in 2012 and 2013 were virtually identical. He opined, however, that looking forward beyond the first 3 months of the year, the difference in 2013 was the absence of special events such as those of 2012: the King Tut exhibit, the Chihuly Garden and Glass opening, and the Space Needle's 50th anniversary existed in 2012. Further, Douglas compared the guest count forecast and current shift schedule for April 2013 with the actual counts for April 2012 noting that although the guest to server ratio was expected to increase in 2013 from 2 more lunch guests per shift (2012, 26.9 guests per server shift; 2013, 28.6 guests per server shift) and 5 more dinner guests per shift (2012, 23.3 guests per server shift; 2013, 28.1 guests per server shift), these numbers were still within his optimal range of 30–33 guests per shift for

[16] Some existing servers bid on fewer shifts than they previously had while others bid on more. The net increase among existing servers was 16 shifts.

[17] The parties agree that approximately 25 shifts were added and the complaint alleges that approximately 25 shifts were added. This number was arrived at by comparing the server bid sheet for the week of March 18 to the server bid sheet for the week of March 25. It appears, however, that 30 shifts were actually added as follows: Pam–1, Michelle–1, Kerra–2, Angie–2, Jeremy–1, Laura–1, Walter–1, Candace–1, Alan–1, Amanda–1, Kate–1, Sara–1, Paul–3, Ashli–3, for a total of 20 shifts plus 10 more taken 5 each by recalled employees TC and Steve. The number of shifts added will thus be termed 25–30 shifts in this decision. I do not find the difference in 25 and 30 significant in the circumstances of this case.

lunch and 28–30 guests per shift for dinner. Since, in his view, the current servers could accommodate these numbers, he did not find cause for a second spring bid in 2013.

Analysis

There is no doubt that Respondent made the March 25, 2013 changes to employees' schedules unilaterally; that is, without notice or consultation with the Union. Generally employee hours constitute a mandatory subject of bargaining.[18] Section 8(a)(5) establishes an unfair labor practice if an employer makes unilateral changes in mandatory subjects of bargaining. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). Thus, unless the Union waived its right to bargain about shift changes and the timing of bids, Respondent's unilateral action would violate the Act.

In order to establish waiver of the right to bargain over mandatory subjects of bargaining, an employer must establish that the union has clearly and unmistakably relinquished that right. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708–709 (1983). Absent an express waiver, waiver may nevertheless be inferred from a past practice. *Litton Microwave Cooking Products v. NLRB*, 868 F.2d 854, 858 (6th Cir. 1989) (history and practices of employer and union, the common law of the shop, informs interpretation of contract). Thus, a unilateral change made pursuant to a longstanding practice is the continuation of the status quo and not a violation of Section 8(a)(5). *Courier-Journal*, 342 NLRB 1093, 1095 (2004). I find that on March 25, 2013, Respondent lawfully unilaterally added 25–30 shifts to the schedule based upon its consistent,[19] longstanding practice of doing exactly the same thing (adding and subtracting shifts without benefit of a bid), thus merely maintaining the status quo.

The record indicates that over the past 3 years, Respondent routinely added and subtracted lines and shifts to and from the schedule. This was handled unilaterally and usually without benefit of a bid. There is no evidence that Respondent has ever consulted the Union or bargained about these additions. Examination of the 3 years of schedules in the record, indicates that lines and shifts are added and subtracted on a weekly basis. For instance, after the spring bid in February 2013, initially there were 145 shifts per week. This number decreased weekly by one or two shifts until the March 25 schedule issued. Similarly, in 2012, immediately after the spring bid, numbers of shifts per week fluctuated from 143 to 154 until the second spring bid. After that bid numbers of shifts per week fluctuated from 189 to 176 until the summer bid was implemented in mid-June. In May 2011, 26 shifts were added to the schedule without benefit of a bid or bargaining. There is no evidence that the Union was consulted regarding any of these shift additions or subtractions. Further, there is no evidence that the Union was ever consulted regarding the timing or number of bids each year.

On April 1, 2013, shortly after the March 25 schedule was posted, Shop Steward Christianson met with CEO Sevart to ask for a second spring bid. The nature of their discussion indicates that the Union did not specifically assert a right to negotiate for a second spring bid or for specific numbers of shifts. Rather, Christenen asked for a second spring shift because employees had bid on the February spring shift thinking they would be able to change their shifts in April with a second spring shift. Employees also believed they were busier than normal and that a second spring shift would alleviate that. In any event, he did not ask to bargain about a second spring shift. This conversation does not, of course, constitute a waiver. It is important because the tenor of the conversation is consistent with the absence of any evidence that the Union requested bargaining over shift and bid changes.

There is absolutely no evidence that the Union and Respondent have ever bargained in the past about numbers of bids or numbers of shifts. A practice such as this one, that occurs with regularity and frequency for an extended period of time with a reasonable expectation that it will continue, constitutes a past practice. See, e.g., *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 353 (2003), enfd. 112 Fed.Appx. 65 (D.C. Cir 2004). I find that the addition of lines and shifts without bargaining with the Union constitutes a past practice. I infer from this past practice that the Union has clearly and unmistakably waived the right to bargain regarding addition of lines and shifts to the schedule.[20] Or stated differently, I find that Respondent maintained the status quo in continuation of its past practice of unilaterally adding shifts to the schedule when it added 25–30 shifts to the March 25 schedule. Similarly, there is no evidence that the timing and number of bids per year has been bargained. Rather, the evidence is uniformly that a business forecast determines the number of shifts and the timing of bids. Because I find a past practice of unilateral change in numbers of bids and shifts and infer from this past practice that the Union waived any right to bargain about these matters, the particular rationalization for foregoing a second spring bid in 2013 is irrelevant.[21]

I find that standing alone, addition of approximately 25–30 shifts to the schedule on March 25 does not constitute a unilateral change because there is an identical past practice of unilaterally adding lines and shifts. An inference of waiver regarding bargaining over these weekly changes to the schedule also convinces me that no unilateral change occurred but, rather, the status quo was maintained. Thus I also find that in addition to the unilateral change allegation lacking merit, the 8(a)(5) and (1) complaint allegations regarding failure to call employees from layoff to cover the new schedules and waiting until the right of recall expired for those laid off in order to avoid rehire are also lacking in merit.

[18] Sec. 8(d), 29 U.S.C. Sec. 158(d), sets forth the parties' duty to bargain in good faith with respect to wages, hours, and other terms and conditions of employment.

[19] See, e.g., *Caterpillar, Inc.,* 355 NLRB 521, 522–523 (2010) (thread of similarity must link changes in order to constitute past practice in support of waiver).

[20] See, e.g., *Mt. Clemons General Hospital,* 344 NLRB 450, 460 (2005) (waiver inferred from past practice of 20 years of making similar unilateral changes without any requests by union to bargain over them).

[21] Although I have not relied on Respondent's management rights clause in finding waiver, it is nevertheless consistent with the parties' past practice in that it provides, inter alia, "The Employer retains all rights to operate its business . . . including . . . the rights . . . to determine staffing levels. . . ."

VI. ALLEGED FAILURE TO RECALL/REHIRE JULIA DUBE, FAILURE TO CALL DUBE FOR "NEED" SHIFTS, FAILURE TO REHIRE DUBE

The General Counsel alleges the following violations of 8(a)(1) and (3): that since March 25, 2013, Respondent failed to recall Union activist Julia Dube and other employees including one more senior laid-off server, Tracy McCauley, from layoff and that since March 25, 2013, Respondent failed to rehire Dube. The General Counsel further alleges that around February and March 2013, Respondent failed to call Julia Dube for approximately two "need" shifts in violation of Section 8(a)(1) and (3).[22]

A. Alleged Failure to Recall/Rehire Julia Dube

Facts

Dube began working for Respondent as a server at Sky Restaurant in June 2011. She and 10 other servers were laid off in January 2012. Six more senior servers than Dube were recalled in February 2012. Dube and one other server were recalled for work beginning in April 2012. Dube and nine other servers were laid off in January 2013. As mentioned before, seniority is retained for 120 days after layoff. Any days of closure for renovation are added to the 120 days. Dube was laid off on January 5. Therefore, her seniority would expire on May 12 (120 days plus 7 days due to maintenance and renovation).

Dube was outspokenly pro-Union. She wore a Union button during "button drives," she was on the Union's advisory council, and she participated in bargaining and mediation sessions on behalf of the Union. Dube took part in a flyer campaign outside the Space Needle on August 27 protesting the discharge of restaurant cook Pete Miranda (Dube's boyfriend) and the suspension of a restaurant server assistant. The flyers stated that both Miranda and the server assistant were strong Union supporters and the banner asserted, in part, "Space Needle Management Imposes Unjust Discipline on Union Supporters." In testimony at the hearing, members of management consistently named Dube as one of the stronger Union supporters.

In late fall 2012, Dube spoke to Dare right after a decertification petition[23] was filed. Dare asked Dube what she thought about "all this Union stuff going on." Dube responded that she didn't know. Dare said, "Well, why do you think they're holding up the negotiations on the successorship and nonsubcontracting stuff?" Dube said, "I really don't know. I guess it seems like that would secure their financial stream of income." Dare agreed saying, "Yeah, it seems like they're more interested in their financials than they're interested in your best interest."

As part of the dues deduction spreadsheets prepared to reinstitute dues deduction, information was set forth on a January 23 spreadsheet listing employees in apparent order of seniority and setting forth recall dates for various servers. Recall status was given as either "2/4/13" or 4/15/13." Eleven employees were listed for recall on February 4 while eight employees, including Dube, were listed for recall on April 15. Other employees were noted as "no return expected" or "possible return." A newer version was prepared on February 4, and was only two pages while the January 23 spreadsheet was four pages. Laid-off employees were not included on the February 4 spreadsheet.

On February 10, 2 days before an all-employee meeting to discuss the future of the Union, Dube forwarded an anonymous pro-Union email to 55 coworkers. The email set out the current status of bargaining between the Union and Respondent and summarized perceived changes that might occur without a Union. Noting that the unknown author made "some valid points," Dube concluded, "every member has a right to a voice and a vote." Dube's email was, in turn, forwarded to Wright, Sevart, Dare, Reddaway, and the entire SkyCity management team. Sevart agreed that some of his comments at the February 12 meeting were to address perceived misstatements and fears set out in the anonymous letter. Sevart was aware that Dube forwarded the anonymous letter.

On Tuesday, February 12, all employees attended one of two meetings held on the Skyline level of the facility. The meetings were characterized in announcements as discussions regarding the future of the Union. Owner Jeffrey Wright and President and CEO Ron Sevart spoke to assembled employees and managers. Wright made brief remarks basically telling employees he had no current plans to sell the Space Needle. He said the Union only wanted a successor clause in the contract to address its troubled pension plan. Wright indicated he was unhappy with the Union's unfair labor practice charges and offended by by Union fliers.

Using a script, Sevart spoke about the breakdown in negotiations for a new contract and the Union's insistence on reinstating dues deductions. Sevart told the employees,

> Interestingly, as we looked at the dues situation, we determined, based on information the Union sent us, that 126 of our 189 Team Members are not paying dues, many of those have let their memberships lapse, and there are 24 Team Members who have never joined the Union. That means a minimum of 150 of our 189 Team Members, or 80% of our Team Members represented by [the Union], are not paying dues.

Sevart stated that he was surprised that some employees thought it was the Union that paid for their benefits. He found this out when employees expressed concern that they might lose their health or retirement benefits if they resigned from the Union. Sevart told employees, "[Respondent] provides all of your benefits. . . . The Union pays nothing."

Sevart stated that it was apparent that few employees wanted dues deducted from their checks noting that only one employee requested a form asking for dues to be deducted. Because of this, Sevart told the employees that Respondent would not comply with the Union's request to reinstitute dues deduction. Sevart warned that this would no doubt lead to the filing of yet another unfair labor practice charge. He illustrated the NLRB charge history with a power point presentation pointing out that in the past 4 months, the Union had filed 16 unfair labor prac-

[22] The General Counsel's request to withdraw the 8(a)(5) allegation regarding failure to recall Dube for needs shifts is granted.

[23] Although witnesses mentioned a decertification petition, there is no further evidence regarding such decertification proceedings.

tice charges against Respondent. Sevart told employees that each charge cost thousands of dollars in legal fees no matter how frivolous the charge might be.

Sevart opined that the charges were the Union's method of pressuring Respondent to sign a contract based on terms Respondent could not accept. Sevart highlighted successorship and subcontracting as the unacceptable terms—terms that were never included in past contracts. For instance, Sevart explained that a successorship clause would require any purchaser of the business to accept the terms of the expired contract. Sevart told employees that the Union wanted a successorship clause because its pension fund was underfunded and categorized as "critical" by the U.S. Government, "the worst category other than failed." A successorship clause would require any purchaser to assume the pension fund's unfunded liability, according to Sevart. As to subcontracting, Sevart advised it was an efficient management right that Respondent would not give up. He noted that in the past no employees were ever displaced due to subcontracting and that subcontracts had been awarded to unionized entities.

Sevart told employees that the Union's options in this situation were either to attempt to reopen negotiations and give up insistence on successorship and subcontracting, launch a boycott, or go out on strike. A power point presentation regarding strikes was accompanied by Sevart's explanation that strikers are not paid, could not collect unemployment compensation, and could be temporarily or permanently replaced. Sevart noted that when employees of Hostess went on strike, the company closed its doors and 18,000 employees lost their jobs. Sevart concluded, "union or no union, we are commi[t]ted to doing the right thing, contract or no contract."

Dube attended both sessions of the February 12 meetings. After the morning meeting, Dube spoke to Dare and Wright. According to Dube, Dare said she could not make any promises but wouldn't it be great if she could offer employees better shifts without bidding and seniority. Dube responded that it was a double-edged sword. She added that she appreciated her job because she had those protections. Dube then asked Wright why successorship was an issue at bargaining if Wright had no plans to sell the business. Wright responded that he didn't want to tie his hands in the future.

On February 18, Dube emailed Dare telling her that she was ready to return to work. Dube volunteered to help in any training for new hires if Dare thought Dube would be a good fit for this. Dare did not respond to this email.

In any event, on March 20, Dube and others heard from lead server, Jeff Townley, that Dare was soon going to be adding shifts. Anecdotally, servers felt they were very busy. Christensen testified that he normally was assigned three to five tables per shift but at this period of time was working six to seven tables per shift. Server Heckendorn testified that he was doing extra work during this time too. In the kitchen, line cook Roos felt the volume of work was higher than usual.

Vice President Douglas testified that in mid-March, he decided that a second spring bid was unwarranted. Dare made an announcement to the servers at about the same time telling them there would be no second spring bid.

On March 21, the Union held a rally at the base of the Space Needle. Dube, who took part, saw Dare and Executive Chef Jeff Maxfield observing the marching and chanting employees. They were laughing and talking at the time she observed them.

On March 25, Dare added approximately 15–20 shifts to the schedules of existing servers and 10 shifts were picked up by two recalled servers. After this recall, Dube was second in line for future recall. In order to accommodate the 25–30 new shifts without adding more than two laid-off employees, all daytime on-call shifts and one evening on-call shift were dropped. Ordinarily, a shift cannot be dropped outside of a bid. It is unclear whether Dare offered the extra shifts to all current servers. For instance, the most senior server, John Heckendorn, who carried four shifts already, testified that he was not asked to take an additional shift.

On one prior occasion, Respondent added approximately 26 shifts to the schedule without benefit of a formal bid. This occurred during the week of May 23, 2011. According to that schedule, current employees absorbed 15 of the new shifts and 3[24] laid-off employees were recalled to handle 11 of the new shifts plus 3 on-call shifts. No on-call shifts were eliminated.

In any event, returning to 2013, on March 28, Dube attended a mediation session as part of the Union committee. She ran into Reddaway and Douglas in the elevator but the parties were in separate rooms throughout the mediation. Later that day, Dube was told that Dare "was making phone calls like crazy" to cover shifts. Based on this information, Dube emailed Dare:

> Just wanted to remind you all that I'm just across the street & available to work asap, including single-shifts over the Easter weekend if needed. I ran into Zara tonight, & she mentioned you were having a hard time filling upcoming shifts. And of course, cruise ships April 15!!!!!

Dare responded within minutes: "Dube not sure what she [Zara] was talking about I have 16 servers all weekend I'm doing fine. I brought back TC and Steve [the two servers recalled on March 25] that's enough for now."

On April 1, Dube and Shop Steward Christensen met with Michael Douglas to discuss two items: whether there was going to be a second spring bid as in 2012, and Dube's return to work. Christensen told Douglas that initially Dare informed servers that there were would be a second spring bid in 2013 just as in 2012. In fact, Christensen selected shifts for his first spring bid relying on the knowledge that he would have a second spring bid. Dube told Douglas she heard that Dare did not want to recall her but when questioned by Douglas, she could think of no reason why Dare would not want to have her return to work. Dube gave Douglas a compilation of compliments from customers.

On April 2, Dube called Dare and asked about recall. Dare said "we're going to do it all new this year . . . [because] we . . . made some hiring mistakes last year." Dare told Dube that former employees not recalled as of that date would have to reapply and reinterview: "Well, you're all going to be hired brand new. We have a whole new hiring process, whole new training process, whole—you're going to have to reinterview."

[24] A fourth laid-off employee is shown on the schedule but is not assigned any shifts.

Dare did not testify about this conversation or lack thereof. I credit Dube's testimony as plausible and as supported by subsequent emails and events. Dube immediately called Reddaway for further clarification. Reddaway said she did not know anything about this and would call Dare and get back to Dube.

At 5 p.m. on April 2, Reddaway wrote to Dare asking if Dare made a blanket statement about servers needing to reapply "if they are not on the schedules effective today? Are you changing protocol for people who may still stand to be recalled and would not need to reapply?" Dare did not respond. Douglas, who was copied on Reddaway's email to Dare, responded at 5:26 p.m.:

> If a person is not recalled by the time they reach their 120 day call back window (Julia last day Jan 5th, 120 day May 5th) our current protocol is that they can reapply. Contractually I don't think we can require her to do anything else until she is outside of her 120 day window. If we add lines to the schedule and she is due to be called back by her seniority rank before the 120 window expires she is required to be rehired. If we have performance issues with someone in that position we should have a candid talk with them and document it on a green document the first day they return.

The following morning, according to Dube, Reddaway called her and confirmed that, yes, everyone would be reinterviewed before anyone was rehired and this would not occur until June. Reddaway did not admit or deny this testimony. During her testimony she stated that Respondent was unaware where Dube had heard that a shorter amount of time than the allotted 127 days of recall eligibility. This is belied, however, by her email exchange with Dube in which Dube stated that she heard this from Dare. I credit Dube's testimony that Reddaway called her and confirmed that laid off employees not recalled by April 2 would be reinterviewed before rehiring.

Somewhat in contrast, in an April 4 email to Dube, Douglas stated that he expected sometime in May servers would start being recalled. He noted that Dube was second most senior of the laid off servers and alerted her to the fact that if she was not recalled by May 12, she would need to reapply and her eligibility for benefits would start over from scratch. Douglas also stated that he conferred with Dare about concerns Dare had about Dube's performance. Dare's concerns were about Dube's interactions (unspecified) with managers and staff. Douglas assured Dube that since Dare's concerns were not in Dube's file, they would have no effect on Dube's recall but the subject would be discussed with her once she was recalled.

Douglas attached a memorandum of April 3 to his email. In this memorandum, Douglas reviewed the issues raised by Christensen regarding a second spring bid. Initially, Douglas noted that the first 3 months of 2012 and 2013 were nearly identical in terms of server hours, average number of guests per shift, and number of guests served per server hour. However, looking forward, Douglas noted that April and May 2012 were extraordinary in that the Space Needle celebrated its 50th anniversary at the end of April, the King Tut exhibit opened in mid-May, and the Chihuly Garden and Glass Exhibition was "about to open." Due to these circumstances, in early April there were five additional servers on staff in 2012 than currently on staff in 2013. Douglas asserted,

> From our perspective we were staffed more heavily in 2012 [than] we needed to be because we were preparing for the special events coming on line in late April and May. Without those events occurring this year we have decided not to add staff as early as we did last year. It's apparent that we acted prudently last year to add staff before we needed them to make sure we were set to operate at a high level when the special events began to occur.

On April 9, Sevart wrote to Douglas asking how to respond to Julia Dube, who had called him that date. On the following day, Douglas opined that the next additions to staff would likely be in May but it was too soon to say whether it would be early or late May. Douglas also noted there were two more senior servers out on medical leave but due to return soon. In fact, one of the servers returned beginning the week of May 6 and the other returned the week of May 27. Finally, Douglas lamented that although Dare had issues with Dube, nothing was in Dube's file regarding such matters. In light of this failure, Douglas stated that if Dube applied and passed the qualifying and pretesting, Respondent "would likely have to offer her a job. To not do so would invite a ULP that we could not defend. A great object lesson about communicating issues, rather than sitting on them." On this same date, April 9, personnel action notices were ordered for Dube and the server immediately senior to her as well as several just below her in seniority. The resulting notice for Dube showed she was terminated with the explanation, "Laid off." Ordinarily, such notices are not ordered unless recall is unlikely.

On May 7, 5 days before Dube's recall rights expired, Respondent posted ads for two server positions. Those applying were invited to a hiring event or job fair the following week. Dube was not aware of the postings or the job fair. On May 22, on finding out about the postings, she applied online for a server position. On May 24, Dube was informed that all server positions had been filled and she was asked to come in and submit to a drug screen and background check so she could be offered a position if one became available. On June 7, Dube was offered rehire in a server position. Dube stated that she could not accept the position without seniority.

Later, on June 21, Dube and Dare met by chance at a restaurant. According to Dube, Dare said, "Hey, girl, we gotta talk. You know, I'm only doing what I've been told. I have to do what I have to do to get a paycheck. . . . You know I never had a problem with you." Dare added that she and Dube should never have talked at the February 12 meeting. Although when questioned by the General Counsel pursuant to Rule 611(c), Dare did not recall speaking to Dube in June, when recalled by Respondent, Dare remembered a brief conversation with Dube in June but denied the substance of Dube's testimony. I credit Dube's testimony over that of Dare. Dube was an extremely poised, articulate witness with facts and dates concisely at her command. Although she testified with confidence, there was no arrogance or argument in her manner. Dare impressed me as a hesitant, uncomfortable witness. While Dube was open and alert, Dare was at times evasive and somewhat reluctant.

Dare's overall demeanor gave me the impression that she was carefully watching Respondent's counsel's reaction to her answers. Moreover, her testimony appeared to eminate from a desire to please rather than a desire to search the facts for the truth. Thus I credit Dube's testimony.

An undated applicant requisition signed by Dare requested three additional servers by name. Two, apparently new hires, were Josh Cantrell and Clarity Selzer. The third name listed states, "Rehire Jessica Alderson." Alderson was a prior server who lost her recall rights. She was ranked 5th below Dube in seniority. In any event, these 3 names were among the 13 servers added the week of June 17, 2013, following the posting of the summer bid. With the summer bid adjustment, servers averaged 4.06 shifts per server excluding on-call shifts. During the week of March 25, servers averaged 4.6 shifts per server excluding on-call shifts.

In the early summer, Executive Chef Maxfied, who did not testify, encountered a group of servers discussing the collective-bargaining situation. Maxfield exclaimed that they would have a better chance of winning the lottery than getting a contract. He added that they might as well believe in Santa Claus. I credit the unrebutted testimony of the servers and draw an adverse inference that if Maxfield had been called to testify, his testimony would have been damaging to Respondent.

During the summer or fall, Dare approached Union Steward Christiansen and told him a lot of people were talking about how he was always working for the Union. She asked him why he did so. He did not respond. In another conversation between Dare and Christiansen, this one in the fall after a restaurant manager named Mido had left, Dare said, "Mido doesn't work here any longer. If there's no Union, I know I'll still be coming to work." Dare did not testify regarding either of these conversations. I credit Christiansen's unrebutted testimony.

Analysis

The General Counsel claims that Respondent manipulated the recall of servers in such a way to exclude Dube from recall because of her Union activity. Respondent claims, on the other hand, that there simply was not sufficient business to warrant recall of Dube. Dual motive cases under the NLRA are decided pursuant to a burden shifting analysis based on *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Thus, as the Board stated in *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999), to sustain the initial burden of persuasion the General Counsel must show

> (1) That the employee was engaged in protected activity, (2) that the employer was aware of the activity, and (3) that the activity was a substantial or motivating reason for the employer's action. Motive may be demonstrated by circumstantial evidence as well as direct evidence and is a factual issue which the expertise of the Board is peculiarly suited to determine.

Once the General Counsel satisfies this initial showing, the burden of persuasion shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004).

There is ample evidence of Union activity and no dispute on the record that Respondent was aware that Dube was one of the more active Union advocates among its employees. Further, even though Respondent denies it, there can be no doubt of animus. Owner Wright, in addressing employees on February 12 told them he was offended by Union flyers and unhappy about the many unfair labor practice charges being filed by the Union. During the same meeting, CEO Sevart opined that unfair labor practice charges filed by the Union cost Respondent thousands to defend no matter how frivolous the charges were. Sevart also ran through the Union's current bargaining options noting it could reopen negotiations and concede to Respondent's position, or the Union could attempt a boycott or, finally, the Union could go on strike. Sevart explained that strikers would not be paid, could not collect unemployment, and could be temporarily or permanently replaced. Sevart then alluded to the fate of Hostess employees who went on strike and lost 18,000 jobs when the doors were closed.

The entire tenor of the February 12 meetings, which were advertised to discuss the future of the Union, was strikingly akin to the preelection rhetoric attendant to an initial representation case. In other words, it was not the typical narrative of an intention to foster a 26-year collective-bargaining relationship. Telling employees that their representative was costing Respondent money in defending unfair labor practice allegations in the context of focusing on striking and loss of jobs, referencing the Hostess strike, and in the context of announcing that Respondent would not reinstitute dues deduction is indicative of animus. Additionally, I infer animus from the sequence of communications regarding reinstating payroll dues deduction. Specifically, the January 8 email from Ylvisaker to Sevart, Reddaway, and Douglas displays a desire to delay reinstitution by "volleying" questions to the Union including a "play dumb" question about the meaning of "Rein. Fees."

Further anecdotal experience indicates animus. For instance, Sous Chef Fields told line cook Roos on February 9 that things were getting a little crazy around here in the context of informing Roos of his options concerning the Union. One of those options was to resign from the Union without any effect on wages, benefits, or seniority. Fields concluded, "I know you're a smart guy and you'll make the right decision. I know you kind of see which way the wind is blowing." Although I did not find these comments unlawful interrogation, as alleged in the complaint, the statements indicate animus. Similarly, in a conversation about contract negotiations with various cooks, Chef Maxfield said they had a better chance of winning the lottery than of getting a contract. He added that they might as well believe in Santa Claus. Both of these statements are indicative of Respondent's desire to get rid of the Union and thus constitute animus.

Animus is also specifically attributable to Restaurant Manager Dare. In early summer she spoke with Shop Steward Christensen asking him what the Union did for him and why he was so involved with the Union. Christensen did not respond. In 2012, a restaurant manager left Respondent. Christensen and Dare discussed this and Dare stated that the manager no longer

worked for Respondent and added, "if there's no Union, I know I'll still be coming to work." On June 21, 2013, Dare and Dube saw each other at a restaurant. According to Dube's credited testimony, Dare said, "You know, I'm only doing what I've been told. I have to do what I have to do to get a paycheck. . . . You know I never had a problem with you."

Based upon this evidence, I find that the General Counsel has satisfied the initial *Wright Line* burden. Dube's activity and Respondent's knowledge of that activity is not disputed. The record reveals ample evidence of animus toward the Union. The General Counsel has further shown manipulation of the recall process in order to preclude recall of employees until Dube's seniority lapsed. Thus I find that Dube's Union activity was a substantial or motivating factor in failure to recall Dube and McCauley, the employee immediately senior to her, on and after March 25, 2013. The burden shifts to Respondent to show that it would have taken the same action in any event.

Respondent asserts that even if the General Counsel has satisfied its initial burden of persuasion, it has shown that Dube would not, in any event, have been recalled from March 25 through May 12, the date she lost her seniority. Respondent notes that one other employee, Tracy McCauley, with more seniority than Dube was not recalled.[25] Moreover, Respondent avers that it carefully adhered to its neutral practice of staffing according to historical levels and asserts that none of its staffing decisions were discriminatorily motivated. Finally, Respondent claims there was no business justification for addition of further staff after March 25. Thus, the server hours, labor hours, and number of guests for April 2011 and 2013 are nearly identical.

Although I have found Respondent was free of any duty to bargain regarding weekly line and shift additions, overwhelming evidence indicates that Respondent manipulated this system in order to avoid recalling Dube. Thus, a March 7 update on open requisitions indicates that Respondent anticipated recalling its next two servers on May 15. However, these servers were instead recalled on March 25 when new shifts and lines were added to the schedule. Although in general, Dare testified that when shifts are added to the schedule, existing servers are allowed to fill them in order of seniority, there is no evidence that the shifts added to various servers' schedules for the week of March 25 were added by consent of the server or fiat of Dare. Dare testified that she generally offered new shifts to servers in order of seniority. However, one senior server with fewer than five shifts was not asked to take an additional shift for the week of March 25. Thus Dare's statement of the general rule is controverted. In the absence of specific evidence regarding the March 25 additional shift assignments and specific evidence that the general rule was not followed at least in one instance, I find that Respondent did not adhere to its general rule of following seniority in assigning additional shifts by seniority.

Furthermore, there is no historical evidence of allowing existing servers to add shifts if they must drop an on-call shift to do so. However, eight on-call shifts were dropped on the March 25 schedule in order to assign existing servers eight of the shifts added to the schedule. This marked departure from past practice as well as absence of evidence about whether Dare assigned the extra shifts or asked employees in order of seniority whether they would like additional shifts allows an inference that Respondent simply assigned the additional shifts and unilaterally eliminated eight on-call shifts to do so. Had the eight on-call shifts not been eliminated, Respondent would have been required to recall two additional employees—one of them, Dube. This finding is strengthened by the fact that in 2011, when Respondent added 26 shifts to the schedule in May, three servers were recalled and no on-call shifts were eliminated. In other words, historical evidence tends to indicate that existing servers did not absorb up to 20 shifts in 2011 when the on-call shifts were not eliminated.

Further evidence that Respondent would have recalled Dube absent her Union activity is present in the April 2 exchange between Dube and Dare in which Dare told Dube that Respondent was going to require former employees to reapply and reinterview if they were not on the schedule as of today, April 2. I find, based on this exchange, that Respondent had decided not to consider Dube for recall but only for rehire after Dube had lost her seniority. Dare did not respond to Reddaway's email asking Dare to confirm that she had made this statement. Rather, Douglas responded stating he did not think Respondent could require Dube to reapply until her seniority expired. Dube was not copied on this email.

As set out above, Respondent's evidence has been analyzed to see if it proved its affirmative defense that it would have taken the same action even if Dube had not engaged in Union activity. Respondent's evidence does not satisfy this burden. In fact, the record as a whole indicates that Respondent would not have taken the same action absent Dube's Union activity. Therefore, by failing to recall Julia Dube and the employee immediately senior to her since March 25, 2013, Respondent violated Section 8(a)(3) and (1) of the Act. However, as discussed above in Section V, no violation of Section 8(a)(1) and (5) is found by failure to recall Julia Dube and others.

B. Alleged Failure to Call Dube for "Need" Shifts

Facts

In March 2013, employee Katie Kellogg, who was laid off as a server but working as a cashier at that time, was utilized for two emergency need shifts as a server. From March 4–17, Kellogg worked 18.5 hours in the server position. As a result of working the emergency need shifts, Kellogg's seniority as a server was extended for 120 days from the date of her March 2013 service. No laid-off server more senior to Kellogg (including Dube) was recalled for the March 2013 emergency need shifts.

Dube heard about cashier Kellogg's server work. Dube called Dare who confirmed that Kellogg had worked server

[25] Respondent objected to the General Counsel's "late" addition of a "camouflage" theory to the complaint. I find that such a theory has been present in the pleadings from their inception in the language failure "to recall its **employees** from layoff, including Julia Dube." [Emphasis added.] All parties have been aware since issuance of the complaint if not before that one more senior employee remained on layoff after March 25.

need shifts that weekend and that as a result of Kellogg's working, as was standard practice, Kellogg's seniority date for recall was extended for another 120 days. Dube protested to Dare that she was senior to Kellogg and she should have been called for the shift.

The Union filed a grievance over failure to call Dube for the need shifts that Kellogg worked. The identical situation arose in 2010 when laid off server Drew Collins was not called in for a need shift while a less senior employee, server-trained cashier Hudson, was utilized. A grievance was filed over Collins situation as well. Neither grievance was resolved.

Archived time reports indicate other instances when Hudson and Kellogg filled need shifts. For instance, in 2011, Hudson was working as a server and on two occasions was used for need shifts as a cashier. In 2012, Kellogg, who was a cashier at the time, worked a need shift as a server.

The record indicates that emergency need shifts are rare but, when they occur, are ordinarily filled by employees in the needed classification. However, if Respondent cannot find a current server to fill the position, it utilizes a current employee trained as a server. Such employee is not carrying seniority in the needed position because employees cannot carry seniority in more than one category. This scheme allows less senior employees to obtain a longer recall period than employees on layoff, the ones carrying seniority in the position. Because they are not utilized for emergency need shifts, they are unable to obtain an extension on recall rights.

The Union and Respondent did not reach agreement regarding this situation when it arose in 2010. In the Union's view, the most senior server on layoff should have been offered the need shift if no current servers were available. In Respondent's view, if no current servers were available, employees trained as servers who are currently working in other positions may be used for a need opening regardless of seniority.

Analysis

Although I find the General Counsel has sustained the initial burden of persuasion showing that Dube was engaged in Union activity which was acknowledged by Respondent and I find her activity was a motivating factor in Respondent's failure to use her for the need shift, I find that Respondent would have taken the same action in any event.

Respondent has uniformly filled need shifts within the category needed whenever possible. Thus, routinely a server need shift is filled by a current server. On the few occasions when no server is available to fill a server need shift, Respondent has used a current employee trained in the position rather than an employee on layoff. Although the Union has long protested this practice, the parties have not reached agreement on changing the practice. Under these circumstances, although I have found discrimination in failure to recall Dube since March 25, I find no discrimination occurred when cashier Kellogg was utilized to fill two server need shifts between March 4–17 because Respondent utilized its past practice without any manipulation of the system.[26] Thus, I find that Respondent would have taken the same action in the absence of Dube's protected activity.

C. Alleged Failure to Rehire Dube

Facts

Once servers have lost their recall rights, Respondent may nevertheless rehire them as new employees albeit without seniority or other benefits. Hiring of new employees is usually conducted by advertising on Craig's List. The applicants are screened and those believed to be promising are invited to a job fair. Former employees in good standing are allowed to skip the interview/job fair process and do not have to attend new employee orientation.

In an internal memorandum dated April 9, Douglas stated that it appeared that the next server recall would be in May but stated it was too early to know whether the recall would be in early or late May, i.e., whether it would be before or after Dube lost her seniority. On that same date, however, a personnel action notice was ordered for Dube and the server immediately senior to her. Ordinarily such notices are ordered only when recall is unlikely.

On May 23, 2013, after her seniority had expired, Dube applied for a server position. Typically, after losing seniority, a server may nevertheless be rehired if the server is in good standing and does not have performance issues and the department manager wants to rehire the employee. If these criteria are met, Respondent does not usually interview former employees for rehire. Respondent concedes that Dube met the criteria for rehire.

On May 24, Respondent told Dube that there were no current openings but she should nevertheless come to the office, fill out paperwork, and submit to a drug screen and a background check so she could be offered a position when one became available. Dube did not submit to the drug screen or background check. Further emails were exchanged between Dube and Respondent about what Dube believed was disparate treatment of her application and other employees being given preferential invitations to the job fair and interviews. At one point, Dube was offered an assistant server position which she refused. In any event, internal documents suggest that Respondent was uncertain what to do with the application. One human resources memorandum asks, "What would you like me to do with her? Re-hire her? Interview her? Have Crystal [Dare] interview her?"

[26] It is immaterial to this analysis that even if server seniority were utilized to fill need shifts, Dube would not have been immediately offered the position as she was the fourth most senior employee on layoff at the time.

In any event, on June 7, Dube was offered a server position without seniority. Dube declined the offer stating she could not accept the job with loss of seniority and health insurance. Of the 13 servers added to the schedule starting June 17, 3 were rehires, 2 were transfers, and 8 were new hires.

Analysis

Although the complaint alleges that "since about March 25, 2013, Respondent failed to rehire Julia Dube" in violation of Section 8(a)(1), (3), and (5) of the Act, none of the parties has briefed this complaint allegation. Of course, as the facts above indicate, Respondent did offer to rehire Dube on June 7 after her seniority had lapsed. The rehire offer, like all of Respondent's rehires, was without seniority. Dube refused the offer. I find that this allegation is rendered moot by my earlier finding that Respondent discriminatorily refused to recall Dube because of her Union activity. Given this finding, Dube was not required to accept Respondent's offer to hire her as a new employee.

CONCLUSIONS OF LAW

1. The Respondent Space Needle, LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Unite Here! Local 8 is a labor organization within the meaning of Section 2(5) of the Act. Thus, the dispute set forth in the pleadings in these consolidated cases affects commerce and the Board has jurisdiction of these cases pursuant to Section 10(a) of the Act.

2. At all times since at least 1987, the Union has been the exclusive collective-bargaining representative of the employees below within the meaning of Section 9(a) of the Act. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All food and beverage preparation and service employees at the facility, including cooks, bartenders, kitchen employees, bussers, servers, greeters, reservationist and valet; excluding office clerical employees, sous chefs, guards and supervisors, as defined in the Act, and all other employees.

3. The Respondent failed to reinstate payroll dues deduction despite its prior agreement to do so in violation of Section 8(a)(1) and (5) of the Act.

4. The Respondent unlawfully polled its employees in violation of Section 8(a)(1) of the Act by tracking whether employees requested a sample resignation letter and whether they provided a copy of the resignation letter sent to the Union.

5. The Respondent unlawfully encouraged or solicited employees to resign from the Union in violation of Section 8(a)(1) of the Act.

6. The Respondent unlawfully coerced employees by telling an employee that if he signed a dues authorization form, he would owe 6 months of back dues in violation of Section 8(a)(1) of the Act.

7. The Respondent unlawfully failed to recall employees Tracy McCauley and Julia Dube from layoff because Julia Dube assisted the Union and engaged in concerted activity and to discourage employees from engaging in these or other protected, concerted activities in violation of Section 8(a)(3) and (1).

8. The Respondent did not violate the Act as alleged in paragraph 8 (8(a)(1) polling by tracking whether employees wanted payroll dues deduction reinstated and whether employees stated they would pay dues directly to the Union), paragraph 10 (8(a)(1) interrogation), paragraph 11 (8(a)(1) informing employees their Union sympathies had been polled), paragraph 12 (8(a)(1) and (5) unilateral change in recall procedures), paragraph 13(a) (8(a)(1) and (5) failure to bargain regarding recall of employees including Julia Dube), paragraph 13(b) (8(a)(3) and (1) failure to call Julia Dube for two need shifts),and paragraph 13(c) (8(a)(1), (3), and (5) failure to rehire Julia Dube).

REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1), (3), and(5) of the Act, I shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(3) and (1) of the Act by failure to recall Tracy McCauley and Julia Dube, in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950),with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). Further, Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate McCauley and Dube for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Latino Express, Inc.*, 359 NLRB No. 44 (2012). Additionally, I will order that the customary notice be posted and published in the usual manner.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[27]

ORDER

1. The Respondent, Space Needle, LLC, Seattle, Washington, its officers, agents, successors, and assigns, shall cease and desist from

(a) Failing and refusing to bargain in good faith with Unite Here! Local 8 by reneging on its agreement to reinstate payroll dues deduction.

(b) Polling its employees by tracking whether employees requested a sample resignation letter and whether they provided a copy of the resignation letter sent to the Union.

(c) Encouraging or soliciting employees to resign from the Union

(d) Coercing employees by telling an employee that if he signed a dues authorization form, he would owe 6 months of back dues.

[27] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order, as provided in Sec. 102.48 of the Rules, shall be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) Failing to recall employees Tracy McCauley and Julia Dube.

2. Respondent shall take the following affirmative action necessary to effectuate the policies of the Act.

(a) At the request of Unite Here! Local 8, implement the agreement to reinstitute payroll dues deduction

(b) Within 14 days from the date of the Board's Order, offer Tracy McCauley and Julia Dube full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make Tracy McCauley and Julia Dube whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful failure to recall Tracy McCauley and Julia Dube and within 3 days thereafter notify them in writing that this has been done and that the failure to recall them will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Seattle, Washington, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 4, 2013.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT poll your sympathies regarding Unite Here! Local 8 by tracking whether you requested a sample resignation letter and whether you provided a copy of the resignation letter sent to the Union.

WE WILL NOT fail to recall you or otherwise discriminate against any of you for joining, supporting, or assisting Unite Here! Local 8 or any other union.

WE WILL NOT encourage or solicit you to resign from the Union.

WE WILL NOT coerce you by telling you that if you sign a dues authorization form, you will owe 6 months of back dues.

WE WILL NOT renege on our agreement with the Union to reinstate payroll dues deduction.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with Unite Here! Local 8 and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All food and beverage preparation and service employees at the facility, including cooks, bartenders, kitchen employees, bussers, servers, greeters, reservationist and valet; excluding office clerical employees, sous chefs, guards and supervisors, as defined in the Act, and all other employees.

WE WILL recognize and bargain with Unite Here! Local 8 concerning the terms and conditions of employment of employees in the bargaining unit described above and provide Teamsters Local 89 with notice and an opportunity to bargain over any changes to the employees' terms and conditions of employment.

WE WILL, at the request of Unite Here! Local 8, implement our agreement to reinstitute payroll dues deduction.

WE WILL, within 14 days from the date of this Order, offer Tracy McCauley and Julia Dube full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Tracy McCauley and Julia Dube whole for any loss of earnings and other benefits resulting from our failure to recall them on March 25, 2013, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Tracy McCauley and Julia Dube for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful failure to recall Tracy McCauley and Julia Dube, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the failure to recall them will not be used against them in any way.

SPACE NEEDLE, LLC